

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1256

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90513). Claimant filed a timely request for hearing. On October 1, 2015, ALJ Shoemake conducted a hearing, and on October 9, 2015 issued Hearing Decision 15-UI-45671, affirming the Department's decision. On October 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Open Road Transportation Inc. employed claimant from May 15, 2007 to July 24, 2015.

(2) Claimant's duties included depositing check and cash payments from customers into the employer's bank account. In May 2014, the employer gave claimant \$700 cash to deposit into its bank account the following day. Claimant did not deposit the \$700. Claimant did not inform the employer that she had not deposited the money, or that it had been stolen from her.

(3) In 2014, claimant recorded in the employer's accounting system that the \$700 would be deposited on a future date. In 2014 and 2015, she repeatedly modified the entry, indicating that the \$700 would be deposited at a later date.

(4) The employer discharged claimant for her conduct in 2014 and 2015 regarding the \$700 the employer gave claimant to deposit.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or

wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

At hearing, claimant testified, rather incredibly, that the \$700 the employer gave her to deposit into its bank account in May 2014 had been stolen from her, but that she did not realize until the end of December 2014 that the money had not been deposited, or until March 2015 that it had been stolen from her. Audio Record at 24:00-36:45. Even if true, however, claimant's own testimony shows that she failed to notify the employer after realizing the money had not been deposited, subsequently modified her entry in the employer's accounting system to show that the money would be deposited at a later date when she knew it would not, and failed to notify the employer after realizing the money had been stolen from her. *Id.* Claimant knew or should have known as a matter of common sense that her conduct probably violated the standards of behavior which an employer has the right to expect of an employee. Her conscious decisions to withhold information regarding the deposit from the employer and falsify its accounting records demonstrated indifference to the consequences of her actions. Claimant's conduct therefore was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. To be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant exercised poor judgment in failing to notify the employer after realizing the money had not been deposited. She also exercised poor judgment in subsequently modifying her entry in the employer's accounting system to show that the money would be deposited at a later date when she knew it would not. She also exercised poor judgment in failing to notify the employer after realizing the money had been stolen from her. Claimant's exercise of poor judgment therefore was a repeated act and pattern of, at best, wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that withholding information regarding the deposit from the employer or falsifying its accounting records complied with the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 15-UI-45671 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 12, 2015

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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